



RECHT AKTUELL CURRENT LAW

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Focus in this edition: Real Estate and Tax Law

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1. Bank Must Inform about Commissions

In exceptional cases the financing bank has the obligation to inform about a commission of a real estate agent included in the purchase price (*Bundesgerichtshof / German Federal Court in Civil Matters, January 11, 2011 – XI ZR 220/08*). This obligation exists if the bank knows that the real estate agent has fraudulently disguised the exact amount of the commission. There is a rebuttable presumption against the bank if the information is obviously incorrect. In the case at hand, certain commission payments were specified in the agent's agreement. However, according to the client's pleadings, the commissions actually paid were much higher. The Court remanded the case to the lower court because this specific aspect had not been reviewed from a factual point of view, yet.

2. Breach of Written Form if only one Member of a Civil Law Partnership signs a Lease Agreement?

According to section 550 BGB (German Civil Code), a long-term lease agreement requires written form in order to prevent a premature termination. If the lease agreement is signed by only one member of a civil law partnership without an additional statement of representation, the requirement of written form is not complied with, even if the partner is authorized to sign (*Oberlandesgericht Hamm / Court of Appeals of Hamm, February 16, 2011 – I-30 U 53/10*). Ironically, the case at hand dealt with a law firm specialized in real estate law. The law firm's lease agreement had been signed only by one of the partners without mentioning that he was signing on behalf of all partners as well. Later, the law firm prematurely terminated the lease agreement arguing that the requirement of written form had not been complied with.

3. Building Permit: No Dispensation from the Prescriptions of a Zoning Ordinance

Upon the suit of a neighbor the *Verwaltungsgericht Frankfurt / Administrative Court of Frankfurt, May 17, 2011 – 8 K 3785/10.F* decided that the building permit allowing the expansion of a skyscraper is unlawful if it derogates excessively from the zoning ordinance applicable. The skyscraper, no longer in use and in need of renovation, was supposed to be equipped with a five-storied porch and turned into a hotel. The building permit authority issued a dispensation concerning the number of floors and space laid down in the zoning ordinance as it had already done in the initial permit for the skyscraper in 1973. The neighbor and the Court disagreed. A dispensation would be an infringement of the neighbor's rights. Prescriptions of the zoning ordinance may only be changed in exceptional and minor cases via dispensation by the building permit authority, whereas significant changes like the ones in the case at hand require a modification of the zoning ordinance by the municipality. The city of Frankfurt is planning to file an appeal against the decision of the Administrative Court.

4. **Generating Losses via Circle Sales of Shares among Fellow Shareholders: No Abuse of Tax Law**

Generating losses by selling a share to a fellow shareholder is not unlawful according to section 42 AO (*Abgabenordnung* / German Fiscal Code) merely because at the same time another share is acquired from a fellow shareholder in the same amount (*Bundesfinanzhof* / German Federal Fiscal Court, December 7, 2010 - IX R 40/09). The case at hand dealt with six shareholders of a loss-making GmbH (*Gesellschaft mit begrenzter Haftung* / Limited Liability Company) selling and buying each other's shares. The simple motive to save taxes is no reason to consider the use of a legal option inappropriate. Shareholders are free to sell their shares when and to whom they wish. The deductibility of losses resulting from the disposal of certain assets has been explicitly intended by the legislator. If the GmbH had been liquidated, the fiscal consequences would have been the same.

5. **Foreign Language Course Abroad: Income and Privately Related Expenses**

Whereas the decision to take a language course may have professional reasons, the choice of the place of the course abroad (South Africa) will usually have to be considered to be motivated by private reasons. Therefore, the tuition fee is wholly deductible, whereas the travel costs, as a general rule, may only be partially deductible (*Bundesfinanzhof* / German Federal Fiscal Court, February 23, 2011 – VI R 12/10). According to the judges, doing a language course in South Africa in order to learn English is “quite unusual” and implies private considerations. However, as long as a different allocation of the travel expenses is not proven by either side it is appropriate to split the travel expenses in half. The Court confirms its earlier decision made in 2009 in which it has abolished former case law principles prohibiting a split qualification of expenses.

6. **Outdated Luxury Cars: No Deductibility of Expenses**

Expenses for a Jaguar E-Type, manufactured in 1973, are not deductible (*Finanzgericht Baden-Württemberg* / Fiscal Court of Baden-Wuerttemberg, February 28, 2011 - 6 K 2473/09). According to the judgment such expenses would be just as much part of a private life as expenses that would be made for hunting, fishing or operating a sailing- or motor yacht (section 4 para 5 s. 1 No 4 EStG (*Einkommensteuergesetz* / Income Tax Law). The Swabian judges argue that a Jaguar E-Type, manufactured in 1973, may not provide the same level of comfort and safety as a new car but is likely to raise the owner's sentimental interest due to its appearance as a prototype of a sports-car, its motorization, its rareness in today's traffic as well as its age. For the same reasons, the car is also likely to entertain business partners or serve private interests. The judgment is not final, yet (*Bundesfinanzhof* / German Federal Fiscal Court - I B 42/11). If it becomes final, other decisions regarding a renowned luxury car brand deriving from the Swabian capital Stuttgart may be awaited with great interest.



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